

1-1-2013

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### Recommended Citation

Monahan, Laurie. "Re-Organized Labor: Affirming Labor's Relevance by Reframing its Image and Merging with Allies." Labor & Employment Law Forum 3, no. 3 (2013): 438-460.

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# RE-ORGANIZED LABOR: AFFIRMING LABOR'S RELEVANCE BY REFRAMING ITS IMAGE AND MERGING WITH ALLIES

LAURIE MONAHAN\*

*"At the turn of the century women earned approximately ten cents an hour, and men were fortunate to receive twenty cents an hour. The average work week was sixty to seventy hours. During the thirties, wages were a secondary issue; to have a job at all was the difference between the agony of starvation and a flicker of life. The nation, now so vigorous, reeled and tottered almost to [a] total collapse. The labor movement was the principal force that transformed misery and despair into hope and progress. Out of its bold struggles, economic and social reform gave birth to unemployment insurance, old age pensions, government relief for the destitute, and above all new wage levels that meant not mere survival, but a tolerable life. The captains of industry did not lead this transformation; they resisted it until they were overcome. When in the thirties the wave of union organization crested over our nation, it carried to secure shores not only itself but the whole society." – Martin Luther King, Jr., Illinois AFL-CIO Convention, October 1965*

## I. INTRODUCTION: LABOR UNDER ATTACK

Recent political attacks on labor unions and restrictions on the bargaining rights of workers prompt the question of whether or not American labor unions remain relevant today.<sup>1</sup> Opponents of organized labor argue that cutting bargaining rights will save states money, especially in times of great deficit, and that organized labor results in less opportunities for work and outsourcing of labor to other countries.<sup>2</sup> Supporters of the movement acknowledge its historical success in improving income equality, worker health and safety, and fairer terms and conditions of employment. A historical analysis of the labor movement's successes and failures, in comparison to the political opportunities at the

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\* The author wrote this article in early 2012, while in law school, with feedback from Professor Darren Hutchinson, in association with his class *Law and Social Movements*. The author is now an attorney, in the field of labor law.

<sup>1</sup> See MICHAEL L. ARTZ, *Beyond Wisconsin: Public Employee Union Rights Amidst State Attacks on Public Sector Collective Bargaining*, 2 AM. U. LAB. & EMP. L. F. 1, 3 (forthcoming 2012) (describing the attacks of conservative politicians who attempted to eliminate unions by restricting their ability to participate in the political arena, lobby effectively, and collectively bargain).

<sup>2</sup> See MORGAN O. REYNOLDS, *MAKING AMERICA POORER: THE COST OF LABOR LAW* 187-88 (1987).

time of the labor gains or recesses, reveals strategies that were effective for labor's progress as well as factors that influenced decline.<sup>3</sup> The successful strategies and the factors influencing decline are instructive today, as labor organizers seek to fend off political attacks on labor and to rebuild union power.<sup>4</sup>

Today, unions face membership decline, media scrutiny, and political opposition.<sup>5</sup> Over the years, unions have become an institutional force in workplace equality, with temporary bursts of progress during periods of effective union activism.<sup>6</sup> This article will analyze the historical successes and failures of union activism to reveal how its self-induced divorce from other social movements has contributed to its negatively-framed image as an institutionalized, obsolete form of activism. Instead, the labor movement has the potential for rebirth as a bona fide social movement by allying with other active social movements.

The history of labor reveals two important conclusions: (1) labor has historically isolated itself from other social movements causing opportunities for growth and progress to remain unseized,<sup>7</sup> and (2) the historical abyss between the labor movement and other social movements creates an image of the labor movement as stagnant, established, and unchangeable.<sup>8</sup> For organized labor to flourish today, the labor movement

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<sup>3</sup> See, e.g., William E. Forbath, *The Shaping of the American Labor Movement*, 102 HARV. L. REV. 1109, 1111-14 (1989) (noting the Court's interventions which led the labor movement in America to abandon broad reform ambitions in favor of "an anti-statist outlook").

<sup>4</sup> See Eduardo Porter, *Unions' Past May Hold Key to Their Future*, N.Y. TIMES, at B1 (July 19, 2012), available at [http://www.nytimes.com/2012/07/18/business/economy/unions-past-may-hold-key-to-their-future.html?\\_r=2&pagewanted=1&hp](http://www.nytimes.com/2012/07/18/business/economy/unions-past-may-hold-key-to-their-future.html?_r=2&pagewanted=1&hp) (describing the impact of globalization and the exposure of additional competition to the American labor market and its impact upon the strength and image of labor unions in the United States).

<sup>5</sup> See, e.g., Monica Davey, "Wisconsin Senate Limits Bargaining by Public Workers," NY TIMES (Mar. 9, 2011), available at [http://www.nytimes.com/2011/03/10/us/10wisconsin.html?\\_r=2&scp=1&sq=wisconsin%20senate&st=cse](http://www.nytimes.com/2011/03/10/us/10wisconsin.html?_r=2&scp=1&sq=wisconsin%20senate&st=cse) (discussing the passage of Wisconsin's labor bill which increase pension and healthcare costs for public workers and sharply curtails the collective bargaining rights of union members in the state).

<sup>6</sup> See Charles Craver, *Why Labor Unions Must [and can] Survive*, 1 U. PA. J. LAB. & EMP. L. 15, 16 (1998) (following the passage of the NLRA, unions saw startling growth in its membership).

<sup>7</sup> See, e.g., Reuel Schiller, *From Group Rights to Individual Liberties: Post-War Labor Law, Liberalism, and the Waning of Union Strength*, 20 BERKELEY J. EMP. & LAB. L. 1, 5 (1999) (demonstrating that as labor's focus on the theory of interest-group pluralism declined, so too did the membership).

<sup>8</sup> See Thomas A. Kochan, *Labor Policy for the Twenty-First Century Workplace*, 1 U. PA. J. LAB. & EMP. L. 117, 131 (1998) (claiming there is little hope, currently, in breaking the stalemate over labor policy).

must align itself with broader social movements and other social groups that seek similar goals of worker and economic justice. It must also reframe its image from an institutionalized, governmentally-regulated procedure to an active social movement advocating for increased worker rights in the face of widening inequality.

#### A. "FRAMING"

Reframing labor as an active movement that advocates for worker rights as well as social and economic justice would appeal to a new group of participants. Labor could encompass people who did not feel connected to the movement because they lacked awareness of union efficacy and those who could join a union but had chosen not to because of the union's negative portrayal. "Framing" is a term used by social movement theorists to describe the way that a social movement crafts its identity and communicates its goals in accordance with the personal values, beliefs, and societal norms of the movements' audience in an effort to maximize the movement's participation and effectiveness.<sup>9</sup> Framing is also a method used by social movements to identify social problems and to articulate solutions and strategies for activism.<sup>10</sup> The framing of a social movement by its organizers sets the targeted problem in its particular social context to connect potential participants to the cause, set goals for organizers and participants, identify political opportunities for the movement's progress, and create and disseminate an image of the movement to the public.<sup>11</sup>

Over time, the labor-management relationship has become an institutionalized process, distanced ideologically from the category of an active social movement. When thinking of a "social movement," marriage equality, anti-war, civil rights, feminism, LGBT, and the environmental movement come to mind. The activism and mobilization of these social movements have had success in achieving not only legislative change, but also cultural change; these movements have effectively altered the public image of the subject of their advocacy, thereby changing the way people think about themselves in relation to those that share different views from them.<sup>12</sup> Some of these more "traditional" social movements have a

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<sup>9</sup> Beth Schaefer Caniglia and JoAnn Carmin, *Scholarship on Social Movement Organizations: Classic Views and Emerging Trends*, 10 *MOBILIZATION: AN INT. J.* 202 (2005).

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> See Michael McCann, *Law and Social Movements*, in *The Blackwell Companion to Law and Society* 506, 508 (Austin Sarat ed., 2004); Frances Kahn Zeman, *Legal Mobilization: The Neglected Role of the Law in the Political System*, 77 *Am. Pol. Sci. Rev.* 690 (1983); Jack M. Balkin, *How Social Movements Change (Or Fail to Change) the Constitution: The Case of the New Departure*, 39 *SUFFOLK U. L. REV.* 27, 27 (2005) (finding constitutional law changes in the face of protests from various social

narrowly defined problem—marriage inequality, the war, racism, subjugation of women, homophobia, environmental waste—that the labor movement lacks, and causes it to be ideologically separated from the category of social movements. In addition, the public likely does not perceive labor as it does other social movements due to its history of institutionalization and federal regulation since the early twentieth century.<sup>13</sup> The institutionalization of the process of labor-management bargaining shifts the understanding of labor as a cause—that of worker rights—to labor as an established, highly regulated process that would not benefit from the activism generated by a traditional social movement.

## II. THE WAVERING TRAJECTORY OF SUPPORT FOR LABOR: HOW LABOR CAN REPLICATE SUCCESSES AND AVOID MISTAKES OF ITS PAST

### A. *Labor in Nineteenth Century America, from Criminal to Legal*

The ebb and flow of union membership throughout American history reflects the labor movement's wavering impact on workplace fairness in our nation.<sup>14</sup> As the social context evolved over time, and as organizing methods shifted with each new change in leadership and ideology, the labor movement has had varying levels of success in achieving its goals.

The American labor movement is rooted in the Industrial Revolution, beginning at a time when mill workers in Massachusetts recognized the occupational hazards of the workplace and where workers lacked rights and production reigned supreme.<sup>15</sup> Factory workers, mostly women, banded together and protested the working conditions of the mills to the Massachusetts legislature.<sup>16</sup> The mill strikers of the 1830s organized 2,000 workers—one of the earliest and largest organized labor movements.<sup>17</sup> Simply put, labor began as groups of workers banded together in collective strength to challenge unfair and unsafe working conditions and to rally to demand the attention of their employers. Since these initial strikes, workers

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movements).

<sup>13</sup> See Charles Heckscher, *Organizations, Movements, and Networks*, 50 N.Y.L. Sch., L. Rev. 313, 313-14 (2005) (stating that for labor unions to survive they need to distinguish the movement from bureaucratic structures and mass-based forms).

<sup>14</sup> See Craver, *supra* note 6, at 15-16 (finding a decline in the power of the labor union translates into increasing difficulty for union employees to “maintain beneficial compensation levels and preserve long-term employment security” and a lack of meaningful control by non-union employees over the terms of their employment).

<sup>15</sup> See generally PHILIP S. FONER, *HISTORY OF THE LABOR MOVEMENT IN THE UNITED STATES VOL. 2: FROM THE FOUNDING OF THE A.F. OF L. TO THE EMERGENCE OF AMERICAN IMPERIALISM* (1975).

<sup>16</sup> See ALICE HENRY, *THE TRADE UNION WOMAN* 4, 12 (Lenox Hill 1915).

<sup>17</sup> *Id.*

formed labor unions across the country for the purpose of negotiating, or bargaining collectively, with their employers for better wages and working conditions.<sup>18</sup> Industrialization created impractical conditions for management-employee bargaining, and so, workers united by striking in urban cities.<sup>19</sup>

Early American labor encountered adversity from the very beginning. For example, employees that went on strike to try to obtain better wages were charged with criminal conspiracy in the *Philadelphia Cordwainer's* case.<sup>20</sup> Labor organization was new during this time period, and viewed with skepticism by the public.<sup>21</sup> The *Philadelphia Cordwainer's* case was eventually overruled by *Commonwealth v. Hunt*, where the court found that union activity was not a conspiracy, that the organizers had justifiable objectives that validated the organizers' attempts to obtain higher wages, and that union abuse must be shown in order to find the union's actions illegal.<sup>22</sup> Here, the legal system aided the shift in the public perception of union activity from a notion of criminal and conspiratorial to justifiable, legal, and an effective means to an end.<sup>23</sup> In this instance, judicial support was crucial to the public's understanding of the need for labor organization, and acted as a tool that framed its objectives as legitimate in the eyes of the

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<sup>18</sup> See PHILIP NICHOLSON, *LABOR'S STORY IN THE UNITED STATES* 72 (Temple U. Press, 2004) (mentioning that the 1830s marked the high-water mark of labor activism in the United States).

<sup>19</sup> See PHILIP DRAY, *THERE IS POWER IN A UNION: THE EPIC STORY OF LABOR IN AMERICA* 1-8 (2011) (describing the plight of the worker in urban cities as they were driven to strike in 1873 for want of money, food, and coal).

<sup>20</sup> *Commonwealth v. Pullis*, Mayor's Court of Philadelphia (1806), also known as the Philadelphia Cordwainer's case. The full case can be found in Commons, John B., A DOCUMENTARY HISTORY OF AMERICAN INDUSTRIAL SOCIETY 59-248 (A.H. Clark Co. 1910) (remembering the strike of journeymen cordwainers in 1805 Philadelphia as they requested the enforcement of a different wage scale and resulting in the criminal prosecution of eight union leaders for criminal conspiracy for "workmen to raise their wages").

<sup>21</sup> See MARJORIE S. TURNER, *The Early American Labor Conspiracy Cases: Their Place in Labor Law, A Reinterpretation* (1967); Morris D. Forkosch, *The Doctrine of Criminal Conspiracy and Its Modern Application to Labor*, 40 TEX. L. REV. 303 (1962); Herbert Hovenkamp, *Labor Conspiracies in American Law, 1880-1930*, 66 TEX. L. REV. 919, 922-24 (1988); Wythe Holt, *Labor Conspiracy Cases in the United States, 1805-1842: Bias and Legitimation in Common Law Adjudication*, 22 OSGOOD HALL L.J. 591 (1984).

<sup>22</sup> *Commonwealth v. Hunt*, 45 Mass. 111 (Mass. 1842).

<sup>23</sup> See LOWELL TURNER & RICHARD W. HURD, *BUILDING SOCIAL MOVEMENT UNIONISM: THE TRANSFORMATION OF THE AMERICAN LABOR MOVEMENT* 12 (Cornell U. Press 2001), available at <http://digitalcommons.ilr.cornell.edu/articles/313> (noting *Commonwealth v. Hunt* "neither removed the possibility nor the likelihood, nor, for that matter, made inevitable the application of the conspiracy doctrine to labor organizations.").



public.<sup>24</sup> The legal system later had both positive and negative effects on enforcing and defining the limits of existing labor laws.<sup>25</sup>

*B. Positive Framing and Institutionalization of Labor in the Twentieth Century, Bolstered by Legislative Endorsement*

The expansion of the labor movement reached a new peak in the 1930s, when union membership was high and institutions for collective bargaining began to form.<sup>26</sup> In 1926, the passage of the Railway Labor Act sanctioned and codified union-management bargaining as a national policy.<sup>27</sup> In 1932, Congress passed the Norris-LaGuardia Act,<sup>28</sup> which removed the power of federal courts to enjoin coercive activity by unions that did not involve fraud or violence;<sup>29</sup> outlawed “yellow dog contracts,” which were contractual agreements that required employees to sign to promise not to join labor unions;<sup>30</sup> and stipulated that the worker should have freedom of association and can form unions without employer interference.<sup>31</sup> The National Labor Relations Act (NLRA or the Act), was passed in 1935 and is the federal law that prohibits employers from retaliating against employees who join or form unions, strike, bargain collectively, or engage in other permissible union activity.<sup>32</sup>

Each incremental legislative victory in defining, legalizing, and legitimizing the process of collective bargaining was instrumental in both the public acceptance of labor organization as a valid tool to negotiating for workplace change, as well as in cementing collective bargaining as a

<sup>24</sup> See Caniglia and Carmin, *supra* note 9.

<sup>25</sup> See, e.g., Jason Mazzone, *Freedom's Associations*, 77 WASH. L. REV. 639, 654–58 (2002) (stating the Court began to uphold provisions requiring employees to join a union as a condition of employment, to finance union activities, and to be bound by the terms of collective bargaining agreements).

<sup>26</sup> TURNER & HURD, *supra* note 23.

<sup>27</sup> Railway Labor Act, 45 U.S.C. § 151 (1926).

<sup>28</sup> Pub. L. No. 72-65, 47 Stat. 70 (1932) (codified as amended at 29 U.S.C. §§ 101-15 (2006)).

<sup>29</sup> Section 102 of the Norris-LaGuardia Act states, in part, “[Because] the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor . . . it is necessary that he have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . .” Norris-LaGuardia Act, 29 U.S.C. § 102 (2006).

<sup>30</sup> See 75 CONG. REC. 4504 (1932).

<sup>31</sup> Norris-LaGuardia Act, 29 U.S.C. § 101 (1932).

<sup>32</sup> National Labor Relations Act, 29 U.S.C. §§ 151–169 (2012).

regulated form of negotiation.<sup>33</sup> While the movement was successful in achieving critical legislative gains, such as legislation prohibiting retaliation for union activity, these very gains also contributed to the institutionalization of organized labor.<sup>34</sup>

"Institutionalize" is defined as the process of incorporating into a structured and often highly formalized system.<sup>35</sup> When a process is institutionalized into a structured or highly formalized system, its potential for change by nature diminishes. In the context of social movements, an achieved process, structure, or system like collective bargaining that addresses a targeted social problem evokes both a sense of accomplishment as well as a sense that the problem is solved—moot, obsolete, rectified, and needing no further advancement.<sup>36</sup> The problem with gain is a reduced sense of urgency for the movement. The reduced sense of urgency then gradually impacts a decline in participation in the movement.

Nonetheless, during the time period following these significant legislative gains a massive upsurge in union membership occurred concurrently.<sup>37</sup> The legislative support provided legitimacy for the process of labor organization, and momentum for the movement. Additionally, the legislation was effective in establishing change in the workplace, resulting in more employee-favorable terms and conditions of employment. The legislation was effective in serving its intended purpose and in catalyzing participants to join unions.

At the time of high union membership, organizers targeted union members, seeking valuable political support for politicians who supported labor policy and legislations.<sup>38</sup> The uptick in union membership provided political meaning to the labor reform laws of Senator Wagner and helped

<sup>33</sup> See Dorothy Sue Cobble, *The Intellectual Origins of an Institutional Revolution*, 26 ABA J. LAB. & EMP. L. 201, 203 (2011) (noting the Act's focus on collective bargaining as an economic stimulus plan that did not involve significant government involvement).

<sup>34</sup> Karl E. Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-1941*, 62 MINN. L. REV. 265, 267, 321 (1978) (relating that even though workers in unionized industries enjoyed a higher standard of living and more security, the Act failed to enhance their decision-making capabilities); Staughton Lynd, *Government Without Rights: The Labor Law Vision of Archibald Cox*, 4 INDUS. REL. L.J. 483, 488 (1981).

<sup>35</sup> See MERRIAM-WEBSTER DICTIONARY, available at <http://www.merriam-webster.com/dictionary/institutionalize> (last visited Mar. 24, 2013) (defining the term "institutionalize").

<sup>36</sup> David S. Meyer, *Defining Social Movement "Success,"* in THE SOCIAL MOVEMENTS READER: CASES AND CONCEPTS (Jeff Goodwin & James M. Jasper eds., 2d ed. 2009).

<sup>37</sup> Turner & Hurd, *supra* note 23, at 12.

<sup>38</sup> See generally Robert M. Cohan, *Of Politics, Pipefitters, and Section 610: Union Political Contributions in Modern Context*, 51 TEX. L. REV. 936 (1973) (stating that labor, unlike corporations, did not begin large-scale, direct involvement into national politics until the 1930s).



encourage broader institutional change for labor.<sup>39</sup> The political opportunities for the labor movement at this time were ripe, as high union membership translated into a higher number of votes for politicians that supported labor-friendly legislation. “Political opportunities” are moments in time when the political conditions are ideal for allowing social movement gain.<sup>40</sup> A social movement may seek to exploit a political opportunity to its benefit when the political system is either substantially disrupted, and thus vulnerable to change, or when the social movement may further its agenda because of an alignment with the party in power.<sup>41</sup> High union membership easily translated into political support for labor-friendly politicians.

Today, labor’s organizing strategy is still reactive, when it should be proactively increasing membership by learning from its past success. High union membership was linked to political support and positive framing and is a key component of labor’s growth, progress, and relevancy. Now that union supporters have defended against some of the most threatening attacks,<sup>42</sup> organizers can use organizing to gain members’ political support for positive labor policies.<sup>43</sup> Though politically linked, labor does little to organize its members in results-oriented, meaningful political support.<sup>44</sup>

### *C. Labor Suffers in Times of War and Misses Opportunities to Align with Social Movement Allies*

In contrast to the 1930s labor successes, during the next decade, the

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<sup>39</sup> Turner & Hurd, *supra* note 23, at 13.

<sup>40</sup> See Donna A. Barnes and Catherine Connolly, *Repression, the Judicial System, and Political Opportunities for Civil Rights Advocacy during Reconstruction*, 40 THE SOC. QUARTERLY 327-45 (1999).

<sup>41</sup> *Id.*

<sup>42</sup> Union organizers staged a sit-in at the Wisconsin State House in opposition to Wisconsin Governor Scott Walker’s anti-labor budget bill. See Dan Benson, Steve Contorno, and Ben Jones, *Police: Wisconsin Protest Saturday ‘One of Largest*, USA TODAY (Feb. 27, 2011), available at <http://www.usatoday.com/news/nation/2011-02-26-wisconsin-saturday-rallyN.htm> (last visited Mar. 25, 2013) (stating that over 100,000 people protested Governor Walker’s budget repair bill that proposed to cut healthcare plans and pensions and eliminate government workers’ collective bargaining rights).

<sup>43</sup> See, e.g., Molly Bloom, *Early Results in Ohio Suggests Labor Will Win on Issue 2*, STATEIMPACT (Nov. 8, 2011), available at <http://stateimpact.npr.org/ohio/2011/11/08/early-results-in-ohio-suggest-labor-will-win-on-issue-2/> (last visited Mar. 25, 2013).

<sup>44</sup> See, e.g., Roland Zullo, *Union Membership and Political Inclusion*, 62 INDUS. & LAB. REL. REV. 22, 24 (2008) (attributing labor to an above-average participation in the Democratic party).

Cold War chilled union activity by purging unions of members.<sup>45</sup> Before the anti-Communist sentiment purged unions entirely, a cross-movement opportunity to form a coalition existed.<sup>46</sup> The black civil rights movement, by nature of shared personnel, overlapped with union members in various labor organizations during both the 1930s and the 1940s.<sup>47</sup> Civil rights activism, combined with labor activism, could have corroborated an attack on post-Cold War fear of Communism by reinforcing worker and equal rights as valid causes, distinct from Communism.<sup>48</sup> The framing, the characterization through the media, of black rights and worker rights, if linked together, could have focused the public image of leftist causes away from Communism and back to the real issues at hand.<sup>49</sup>

Anti-communist sentiment alone had a devastating effect on labor and allowed anti-labor legislation to be passed at what would have been a critical time period for a surge in labor organizing through coalition with other civil rights movements. Anti-labor governmental intervention like the Taft-Hartley Act, in addition to the anti-communist sentiments after the Cold War, contributed to the dissolution of the black civil rights and labor coalition that began during the '30s and '40s.<sup>50</sup> The Taft-Hartley Act, formally known as the Labor-Management Relations Act, passed in 1947,<sup>51</sup> demobilized any labor momentum achieved before the act's passage, restricted the right of workers to strike and protest, and supported the characterization of the leaders of the labor movement at that time as radical and associated with communism.<sup>52</sup> Not only could the demobilization of labor momentum have been prevented, but labor and civil rights movements together could have reversed the public perception of leftist causes as Communist, and could have stalled or ceased the passage of the Taft-Hartley Act.<sup>53</sup>

Unions fell into their long-term deterioration when they failed to align with the social activism and revitalization of the 1960s, missing a political opportunity to entrench labor as a cause for all genders, races, and social

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<sup>45</sup> See generally MICHAEL K. HONEY, *Southern Labor and Black Civil Rights: Organizing Memphis Workers* (U. Ill. Press 1993).

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> Cf. Jacquelyn Dowd Hall, *The Long Civil Rights Movement and the Political Uses of the Past*, 91 J. AM. HIST. 1233 (2005) (truncating, by the far-right, the narrative of social movements to misconstrue and undermine economic and structural goals).

<sup>49</sup> James R. Prickett, *Anti-Communism and Labor History*, 13 J. Indus. Rel. 219 (1974).

<sup>50</sup> *Id.*

<sup>51</sup> Labor-Management Relations Act, 29 U.S.C. § 141 (1947).

<sup>52</sup> See Steven E. Abraham, *How the Taft-Hartley Act Hindered Unions*, 12 HOFSTRA LAB. L. J. 1, 3 (1994) (noting the five sections of the Taft-Hartley Act which specifically hindered unions, making it less likely that employees would strike).

<sup>53</sup> *Id.*

classes.<sup>54</sup> In its decline, labor retreated against the increasing power of employers.<sup>55</sup>

Labor union membership has been on an overall declining trajectory.<sup>56</sup> For example, in 1954, thirty-nine percent of the labor force was a member in a private sector union, whereas less than fifty years later in 1999, less than ten percent of the labor force were members in a private sector union.<sup>57</sup> In addition, the rise of the Republican Party during these periods, coupled with labor's decreasing power in association with the Democratic Party due to decreased membership and efficacy, allowed labor's influence on worker bargaining to wane.<sup>58</sup>

Several other factors have influenced union membership decline, having an undoubtedly devastating effect on the efficacy of labor organizing to achieve its goals. One contributing factor is the emergence of business unionism, where management may challenge collective bargaining, enforcement of the contract, representation and other group services like health plans, insurance, group legal services, and decreased participation in necessary labor meetings.<sup>59</sup> Other factors include labor's failure to align with the civil rights, women's, antiwar, or environmental movement;<sup>60</sup> the racial segmentation of jobs in the public sector;<sup>61</sup> and the exclusion of black and Hispanic workers from skilled jobs<sup>62</sup>—without intervention by white union leaders.<sup>63</sup> Moreover, labor lost some credibility by supporting Vietnam War in 1968, when young activists began to see unions as barriers to change.<sup>64</sup> This political misalignment altered the public's progressive image of labor unions and reinforced a stereotype of labor unions as conservative or racially uniform.<sup>65</sup>

<sup>54</sup> Turner and Hurd, *supra* note 23, at 14.

<sup>55</sup> *Id.*

<sup>56</sup> Dan Clawson and Mary Ann Clawson, *What Has Happened to the US Labor Movement? Union Decline and Renewal*, 25 ANNUAL REVIEW OF SOCIOLOGY 95, 97 (1999).

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> Turner and Hurd, *supra* note 23, at 14.

<sup>60</sup> *Id.*

<sup>61</sup> Cf. Jared M. Mellott, *The Diversity Rationale for Affirmative Action in Employment After Grutter: The Case for Containment*, 48 WM. & MARY L. REV. 1091 (2006) (noting the call to expand diversity rationale to employment).

<sup>62</sup> See Leticia M. Saucedo, *Addressing Segregation in the Brown Collar Workplace: Toward a Solution for the Inexorable 100%*, 41 U. MICH. J. L. REF. 447, 459 (2008) (claiming racial minorities were not interested in the more desirable, skilled jobs).

<sup>63</sup> Turner & Hurd, *supra* note 23.

<sup>64</sup> *Id.* at 16.

<sup>65</sup> *Contra*, FRANK TANNENBAUM, *The Labor Movement: Its Conservative Functions and Social Consequences* 110 (1921) ("The old barriers between man and man, the barriers of race, of class, of religion, of sex, lose their meaning in practical application under a system that reduces the basis of group privilege and citizenship to the one thing

### III. LABOR'S RELEVANCE TODAY

#### A. *Keeping Up with the Changing Economy and the Need for New Union Formations*

As the economy changed, union membership in various sectors began to decline because of the loss of manufacturing jobs.<sup>66</sup> The increase in service-sector jobs in the American economy also meant a change in the population and demographic of workers that would presumably seek union membership—women and minorities.<sup>67</sup> But, as women and minorities joined the labor force in droves, unions shied away from recruiting new members from the women and minority categories and from advertising to new sectors of the workforce.<sup>68</sup> Instead, the threat on current union members by increasingly management-friendly political groups caused unions to focus on protecting the contracts of existing members and fighting off cuts to their current members' rights.<sup>69</sup> Understandably, union membership declined in part because of its decreased efficacy in light of the powerful economic and political shifts at play from 1950 onward. Decreased union membership seemed to scare labor organizers into a sense of defeat, and the resulting fear dissuaded unions from fighting the membership decline by recruiting new members in emerging fields, like the service sector, where the new worker demographic of women and minorities began to grow rapidly.

Unions failed to capitalize on a critical economic and technological moment.<sup>70</sup> The categories of certain jobs, trades, and fields created a divide not only by job type but also by nature of job type by gender, and sometimes class and race as well. This kind of union segmentation further distanced the causes labor organizers could have shared.<sup>71</sup> Had labor seen its unions as indistinct, it could have also capitalized on the new and

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that all men may do – work.”).

<sup>66</sup> Clawson and Clawson, *supra* note 56, at 98.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> See Peggie R. Smith, *Organizing the Unorganizable: Private Paid Household Workers and Approaches to Employee Representation*, 79 N.C.L. REV. 45,47 (2000) (determining that employment sectors comprised of prototypical “women’s work” have rarely received the attention of organized labor). But see Keith J. Gross, *Separate to Unite: Will Change to Win Strengthen Organized Labor in America?* 24 BUFF. PUB. INT. L.J. 75, 75(2005) (finding the dramatic decrease in union membership from thirty-two percent in 1956 to eight percent today is attributable to a lack of organizing).

<sup>71</sup> Cf. Gross, *supra* note 70, at 76-77 (discussing the goals of Change to Win, namely, seeking to organize millions of workers in previously unorganized service industries).

emerging job sectors—to gain a valuable increase in membership numbers in the groups of women and minorities.<sup>72</sup> Instead, union segmentation passed the opportunity to expand into these sectors and created yet another impasse between its union groups and other social movements.

Because of the failure of labor to reach out to women and minorities, unions have created an impasse between labor and the feminist movement and civil rights movements.<sup>73</sup> Although a coalition between union members and advocates of the feminist and civil rights movements could have reinvigorated labor's relevance, the gap between labor and the activism of these other movements created ideological distance as well.<sup>74</sup> The dichotomy separated labor organizing from other activist social movements ideologically and physically, and union members did not view their membership as politically or socially meaningful.<sup>75</sup> Union members did not view labor organizing as activist, or as part of a broader social movement.<sup>76</sup> The lack of connection to other social movements was both a function of decreased manpower as well as a palpable distinction between social movements for progressive causes and labor organizing.<sup>77</sup> Even though unions at the time had political objectives and established political action programs, a study of Ohio union membership shows that four-fifths of union members were not even aware of these programs and did not mentally link their union membership with political power.<sup>78</sup>

A. “Schizophrenic” Labor Law:  
*The Need for Unions as Tools of Bargaining Persists*

The New Deal created collective bargaining as a mechanism for employees and employers to resolve employment disputes efficiently and autonomously, and to equalize the bargaining power of the employee to ensure fair working conditions and policies.<sup>79</sup> The development of the legal

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<sup>72</sup> See Gross, *supra* note 70, at 77; Marion Crain, *Between Feminism and Unionism: Working Class Women, Sex Equality, and Labor Speech*, 82 GEO. L.J. 1903, 1956 (1994) (finding women more receptive to organizing than men and therefore the future of labor is linked to their participation); Gregory DeFreitas, *Unionization Among Racial and Ethnic Minorities*, 46 INDUS. & LAB. REL. REV. 284, 300 (1993) (focusing on recruiting Hispanic and Asian American workers as they pose the greatest resource for unions).

<sup>73</sup> Clawson, *supra* note 56, at 99.

<sup>74</sup> *Id.*

<sup>75</sup> See *id.*

<sup>76</sup> See Marion Crain & Ken Matheny, *Labor's Identity Crisis*, 89 CAL. L. REV. 1767, 1770 (2001) (finding labor unions participated in their own marginalization by severing social justice issues from class issues).

<sup>77</sup> *Id.*

<sup>78</sup> Clawson, *supra* note 56, at 99.

<sup>79</sup> *Id.* at 100.

framework was created to ensure enforcement of the collective bargaining system and maintain integrity within labor-management relations.<sup>80</sup> This “legal regime” identified what practices are fair and unfair, legal and illegal, and provided remedies for violations.<sup>81</sup>

While this kind of legal framework contemplates justice and fairness, various court and administrative decisions on cases reveal the convoluted or “schizophrenic” nature of the system.<sup>82</sup> For example, workers have the legal right to strike and it is considered an illegal unfair labor practice to punish or retaliate a worker for striking, but management has the correlative right to maintain production during a strike and is allowed to hire replacement employees for strikers.<sup>83</sup> So even though an employee cannot technically be fired for striking, an employee can easily be replaced—the functional equivalent of being retaliated against.<sup>84</sup> For instance, in the *McKay Radio* case, the court held that workers who go on strike still remain employees of the employer they are striking against but also stated that the employer has no duty to rehire strikers.<sup>85</sup> Union relevancy remains valid today because of its ability to advocate for individual workers through negotiated grievance procedures, and to protect its workers’ rights to seek administrative and judicial remedies for employer wrongdoing.<sup>86</sup>

#### IV. NEW STRATEGIES FOR LABOR

##### A. “Social Movement Unionism”

Lowell Turner and Richard Hurd describe the need for a new “social movement unionism,” which consists of the implementation of innovative organizing strategies centered on rank-and-file mobilization.<sup>87</sup> Social movement unionism is a theory of labor organizing, and rank-and-file mobilization is the strategy within this theory that encourages the members of the unions themselves to be the driving force of change and progress, rather than specifically designated leaders, through increased membership and political advocacy.<sup>88</sup> Social movements are broader occurrences than

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<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S. 333 (1938).

<sup>86</sup> See generally, *WORKING FOR JUSTICE: THE L.A. MODEL OF ORGANIZING AND ADVOCACY* (Ruth Milkman, Joshua Bloom & Victor Narro eds. Cornell Univ. Press 2010) (focusing on the impact of union organizing of low wage workers in Los Angeles, California).

<sup>87</sup> Turner & Hurd, *supra* note 23, at 11.

<sup>88</sup> *Id.*



social movement unionism, but each of these methods of change has a mutual effect on the other.<sup>89</sup>

Social movements are society-wide phenomena that fluctuate erratically, but each activist cause does not exist in isolation from the political, social, and economic background of the time the cause is active.<sup>90</sup> Because of the changing institutional forces, social movements become more popular, supportive, successful, politically influential, and visible to the masses based on the time period in which they operate. Causes are, thus, bound to be varied, both in existence and in success, and social movement unionism suggests that labor capitalize on the broader social context.<sup>91</sup> Social movement unionism is a type of union organizing method founded on member activism and participation and flourishes most healthily when union organizers interact with the broader, more powerful social movements that result in labor law reform and transformative change.<sup>92</sup> Coalition-building can also have a reciprocally positive effect on generating a broader social progression.<sup>93</sup>

#### *1. Dissolving Internal Segmentation and Allying with Other Social Movements*

Many critics of the labor movement urge that labor's success after a period of decline can only be accomplished through a "mass movement" and through alliances with other social movements; the labor movement could also achieve success through union restructuring that erases the existing segmentation of workers and that allows for the formation of unions by new groups.<sup>94</sup> Unions can dissolve existing segmentation by allowing for new unions to be formed and existing unions to be reformed and organized based less on professional differences and more on shared goals.<sup>95</sup> The changing economy also prompts a need to reevaluate existing labor unions to allow for new professional unions.<sup>96</sup>

Labor's historic adversity to certain movements, like union alienation of the environmental movement, when labor leaders saw environmental activism as an attack on union jobs instead of banding together to support

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<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> *Id.* at 11.

<sup>92</sup> *Id.* at 12.

<sup>93</sup> *Id.*

<sup>94</sup> Roy J. Adams, *Industrial Relations Theory*, 58 INDUS. & LAB. REL. REV. 143 (2005) (reviewing Dan Clawson, *The Next Upsurge: Labor and the New Social Movements*).

<sup>95</sup> See Gross, *supra* note 70, at 75.

<sup>96</sup> *Id.* at 120 (describing the modern economy as a "service economy" with most of the former industrial sectors disappearing).

eco-industry job creation, shows that labor has relevance to many other social movements, and should not remain isolated because causes or goals initially do not appear related.<sup>97</sup> The amount of time employees now spend in the American workplace is staggering, and work and employment conditions affects all ages, races, and classes in the United States. The Labor Movement's Lessons Learned from the Civil Rights Movement

An example of social movement unionism can be found as early as the coalition between the Congress of Industrial Organizations ("CIO") and the civil rights movement in the 1930's and 1940's.<sup>98</sup> The CIO was an industrial union that worked tirelessly to promote interracial integration and civil rights in the mid-1930s to late 1940s.<sup>99</sup> In the 1940s, radical black workers led the CIO's movement through use of confrontational tactics.<sup>100</sup> In this way, labor was able to capitalize on the tactics of the civil rights movement to advance its own initiatives and was able to adopt a new confrontational strategy that was proven effective for the civil rights movement.<sup>101</sup>

Some critics suggest, however, that unions and the civil rights movement encountered an increasingly adverse relationship despite their advocacy on behalf of similar populations and despite sharing some similar goals. For example, in *Social Movements and State Transformation: Labor Unions and Racial Conflict in the War on Poverty*, Jill Quadagno suggests that conflict between the civil rights movement and union organizers formed and escalated due to each movement's contrary view of economic justice, and their dissimilar goals for workplace advocacy.<sup>102</sup> "Each [movement] sought dominance for their vision of economic justice," Quadagno writes.<sup>103</sup> Economic justice as a goal for workers in unions translated into a fight for decent wages and equal treatment in the workplace, whereas for civil rights activists, access to jobs was the primary objective of economic justice.<sup>104</sup> To the civil rights organizers, economic justice was linked with the broader concept of social justice, and the even more general idea of access. Labor's world was more contained—enforcement of collective bargaining agreement contracts, the right to bargain with management, and the right to strike. Had labor organizers been able to view their more specific, functionary goals of contract enforcement as subsets of the broader goals of workplace equality and

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<sup>97</sup> See Adams, *supra* note 94.

<sup>98</sup> Larry Isaac and Lars Christiansen, *How the Civil Rights Movement Revitalized Labor Militancy*, 67 AM. SOC. R., 722, 723 (2002).

<sup>99</sup> *Id.*

<sup>100</sup> *Id.* at 724.

<sup>101</sup> Jill Quadagno, *Social Movements and State Transformation: Labor Unions and Racial Conflict in the War on Poverty*, 57 AM. SOC. R., 616, 630 (1992).

<sup>102</sup> See *id.* at 630.

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

living wages for unskilled workers, which are in turn fruits of social justice, labor may have been able to forge an invaluable relationship with the civil rights movement instead of distancing itself as it did.<sup>105</sup>

Quadagno advocates for a “state transformation theory . . . [where] structural and ideological change represent real gains, not merely the co-optation of social movement activists and goals.”<sup>106</sup> Perhaps the entrenched individualist culture permeates even social movements, prohibiting activists from seeing their causes as intertwined. Even when activists are able to unite their distinct causes ideologically, under a broader umbrella of civil rights, workers rights, and abstract understandings of concepts of social justice and human dignity, somehow causes still remain divided—as though one cause needs to lobby harder for the attention of the powerful and that attention justifies the nullification or silencing of another cause. While it is understandable that this ideology may exist, a pooling of resources, personnel, strategies, and ideas would prove infinitely valuable for each collaborator. For example, in the situation of the civil rights movement and labor movement dichotomy discussed earlier, a coalition of the two movements would entail an understanding of economic justice today as both the protection of wages as well as access to jobs.<sup>107</sup> Unions must work with state and local governments to ensure that state, local labor and employment laws and jobs bills reflect the real and actual needs of the workers—be it access to jobs or protection of existing work-related entitlements.

“New social movement theory” describes the trend of studying inter-movement relations rather than studying social movements in isolation, but tends to focus on the study of movements that commence at the same time, excluding the study of labor in relation to other, newer social movements.<sup>108</sup> New social movement theory reduces the study of labor organizing as irrelevant and obsolete in relation to social progress.<sup>109</sup> Social movements today are sometimes seen as worthy new causes only if they achieve new legislation.<sup>110</sup> In this context, the labor movement is sometimes forgotten as a fresh and dynamic social movement because of its established practices and its still-tainted public image for some Americans today.<sup>111</sup> In spite of these factors, other movements on the rise have the

<sup>105</sup> See, e.g., Schiller, *supra* note 7, at 48-49, n. 274.

<sup>106</sup> See Quadagno, *supra* note 101, at 631.

<sup>107</sup> *Id.*

<sup>108</sup> Isaac and Christiansen, *supra* note 98, at 723.

<sup>109</sup> *Id.*

<sup>110</sup> See MICHAEL MCCANN, LAW AND SOCIAL MOVEMENTS, IN THE BLACKWELL COMPANION TO LAW AND SOCIETY 506, 508 (Austin Sarat ed., 2004) (“[L]aw provides both normative principles and strategic resources for the conduct of social struggle.”).

<sup>111</sup> See Craver, *supra* note 6, at 17 (noting most Americans believe labor unions are “outmoded institutions providing representational services no longer needed by

ability to add to and feed off of existing social movement organizations like the labor movement.<sup>112</sup>

For example, several case studies reveal that the civil rights movement inspired the revitalization of several workers' rights movements: Cesar Chavez's leadership of the farm workers in the 1960s; agricultural workers of the Mississippi Freedom Labor union in the 1960s; low-wage service laborers of the Maryland Freedom Union in the 1960s; the 1968 Memphis, Tennessee sanitation workers' strike; the 1969 Charleston, South Carolina hospital workers' strike; Revolutionary Union Movements of the Black auto workers in the 1960s to 1970s; and national wildcat strike of the postal workers in 1970.<sup>113</sup>

Formal ties between some civil rights organizations and labor unions did lead to unions providing some financial support for the civil rights groups, and this served as a direct channel between the two social movements.<sup>114</sup> Isaac and Christiansen also use the term "overlapping personnel" to describe activists with a "foot" in each movement that participated in organizing for both more than one cause and often served as a link between the two causes.<sup>115</sup> The labor movement's relationship to the civil rights movement was different from other social movements because its history was firmly entrenched by the 1960s and, therefore, required more aggressive re-framing to defeat its image of domination by white workers.<sup>116</sup> On the other hand, the interclass conflict in the workplace, inspired by the civil rights movement, played a significant role in rejuvenating the labor movement.<sup>117</sup>

The civil rights movement was able to positively influence the labor movement during the 1960s by serving as an example, and an expansion, of the strategies available for worker organizing. The civil rights movement was ripe with the diffusion of images of riots, protests, and fights for progress.<sup>118</sup> The mass media at the time was critical in the distribution of "tutorials" for other social movements, and these tutorials helped labor

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individuals employment by enlightened business enterprises.").

<sup>112</sup> Isaac and Christiansen, *supra* note 98, at 723.

<sup>113</sup> See, e.g., *id.* at 726 (discovering the link between social movements and the birth of several major labor movements at various points in United States labor history).

<sup>114</sup> See *id.*

<sup>115</sup> *Id.*

<sup>116</sup> Contra Eduardo Porter, *Unions' Past May Hold Key to Their Future*, N.Y. TIMES B1 (July 18, 2012), available at [http://www.nytimes.com/2012/07/18/business/economy/unions-past-may-hold-key-to-their-future.html?\\_r=2&pagewanted=1&hp](http://www.nytimes.com/2012/07/18/business/economy/unions-past-may-hold-key-to-their-future.html?_r=2&pagewanted=1&hp) (hypothesizing that for unions to be reborn, they must stop negotiating for the workers, in their limited constructs and, instead, negotiate for all workers).

<sup>117</sup> Compare Craver, *supra* note 6, at 43 (noting many middle-class, white collar workers question the benefits of membership in a union, viewing it as an organization purely for the lower-class), with Gross, *supra* note 70, at 85 ("[U]nion leaders harbor disgust for what they felt were undeserving, lower-class, unskilled workers. . .").

<sup>118</sup> Isaac and Christiansen, *supra* note 98, at 728.

organizers confront the inter-race and interclass conflicts in the workplace through management relations and individual lawsuits. In addition to the tangible tactics like sit-ins, mass marches, and political strikes, the civil rights movement also encouraged and empowered individual employees to assert their rights under Title VII and combat discrimination in the workplace.<sup>119</sup> Beyond these tactics, the confrontational militancy of the civil rights movement and its pervasive presence in the media changed the cultural attitude towards social movement organizing for all mainstream organizers but, in particular, for labor organizers. Labor organizing shifted from an isolated process of shop steward leadership in the workplace, with a specific function and structure of bargaining, to a more militant and protest-like relationship with management.<sup>120</sup>

*a. Corruption Taints Union Image Despite Corrective Legislation*

Union corruption and racism in union activities and membership threatened trust in labor organizing and union efficacy, the history of which continues to taint the public image of unions.<sup>121</sup> Civil rights activists attempted to combat the issue of racism in unions and argued for changes in the institutional practices of corrupt unions.<sup>122</sup> Craft and other unions were supposed to be helping both skilled and unskilled laborers obtain jobs, participate in apprenticeship programs, and advance their careers through skills training.<sup>123</sup> Union leadership persistently engaged in nepotism in awarding these opportunities, however, which allowed racism to pervade the processes without oversight or challenge.<sup>124</sup> Unions at the time used secret admission and oral examinations, grandfather clauses that rewarded the children of certain workers, and other practices to corrupt the fairness and equity upon which union membership was based.<sup>125</sup>

Federal law, however, was able to begin to try to halt these corrupt practices and purify the processes by which unions operated. The enactment of Title VII of the Civil Rights Act of 1964<sup>126</sup> meaningfully

<sup>119</sup> *Id.* at 740.

<sup>120</sup> See Eli Naduris-Weissman, *The Worker Center Movement and Traditional Labor Law: A Contextual Analysis*, 30 Berkeley J. Emp. & Lab. L. 232, 239-40 (2009) (comparing the struggle of today's undocumented foreign workers with the members of the Civil Rights Movement, as they employ aggressive protests).

<sup>121</sup> See Quadagno, *supra* note 101, at 624.

<sup>122</sup> *Id.*

<sup>123</sup> See Benjamin Rathbun Jr., *The Taft-Hartley Act and Craft Unit Bargaining*, 59 Yale L.J. 1023, 1035 (1950).

<sup>124</sup> See Quadagno, *supra* note 101.

<sup>125</sup> See *id.*

<sup>126</sup> Title VII of the Civil Rights Act of 1964 outlaws discrimination based on race, religion, national origin, or sex in matters of employment by private employers with fifteen or more employees, employment agencies, and federal, state, and local



affected the federal government's ability to engage in the regulation of union affairs.<sup>127</sup> The statute contained prohibitions on discrimination in union actions such as referrals to jobs and programs on apprenticeship, and prohibitions on discrimination in union membership.<sup>128</sup> Unfortunately, much of the legislation introduced and passed to address the problems of discrimination and corruption went unenforced for a long period of time.<sup>129</sup> Even so, these new legal "mechanisms of intervention" gave rise to important protections for workers of the future.<sup>130</sup>

*B. Decentralized Community Building, An Unintended Consequence of "New Federalism"*

In *A New Paradigm for the Labor Movement: New Federalism's Unintended Consequences*, Beverly Takahashi points out that conservative ideology, which she calls "new federalism," may have unintentionally had a positive effect on the labor movement.<sup>131</sup> Takahashi defines "new federalism" as a conservative agenda that shuns governmental intervention and promotes a *laissez-faire*, hands-off governmental ideology that favors the free market, capitalism, and the dissolution of a governmentally-supported social safety net made popular during the era of President Lyndon Johnson and the New Deal.<sup>132</sup> The new federalism ideology supports the devolution of federal powers to state and local governments when possible.<sup>133</sup>

Takahashi contrasts new federalism with the policies popular during the time of the New Deal.<sup>134</sup> She characterizes the social safety net of the New Deal as the "New Deal Labor Paradigm" which espoused an active federal government that was focused on workers' rights, an industrialized economy flooded by mass production, and labor unions as vital auxiliaries to the Democratic Party.<sup>135</sup> But, as quickly as the New Deal Labor Paradigm emerged, the new federalism anti-big-government sentiments rose to challenge the labor paradigm.<sup>136</sup> A shift in the economic, political, and social forces of the times caused the challenge to labor dominance, in addition to the manufacturing decline in the 1970s being a direct cause of

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governments. 42 U.S.C. § 2000e.

<sup>127</sup> Jill Quadagno, *supra* note 101, at 625.

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> Beverly Takahashi, *A New Paradigm for the Labor Movement: New Federalism's Unintended Consequences*, INT'L 17 J. OF POL., CULTURE, AND SOC'Y 261, 261 (2003).

<sup>132</sup> *Id.*

<sup>133</sup> *Id.* at 267.

<sup>134</sup> *Id.*

<sup>135</sup> *See id.* at 262.

<sup>136</sup> *Id.*



union membership decline.<sup>137</sup> New federalism's ideologies unintentionally spilled over to support the strategy of local labor unions in response to the challenges to the labor paradigm.<sup>138</sup>

Labor unions began as small craft unions that operated autonomously, and even with the formation of a national labor system, unions remain decentralized today.<sup>139</sup> Some critics argue that decentralization is one of the major flaws of labor organization, and Takahashi agrees with this observation.<sup>140</sup> Even so, the decentralization of many of the locals across the country, a product of new federalism ideology, has aided locals in collaborating with more local community organizations like nonprofits and government agencies on the state and local government levels.<sup>141</sup> Though today the largest national labor unions—the National Education Association (“NEA”) with two million members and the American Federation of State, County, and Municipal Employees (“AFSCME”) with one million members—unite the smaller locals across the country, labor has also increasingly used coalition with local community organizations as a tool for advancing its goals.<sup>142</sup> In this way, community-building at a decentralized level has proven an effective method of keeping labor alive.<sup>143</sup>

Additionally, at its very core, the concept of collective bargaining and labor organizing can be described and understood as fundamentally conservative.<sup>144</sup> Labor organizing exists to aid workers in resolving disputes outside of the judicial system, informally, and without the aid of the government.<sup>145</sup> Collective bargaining is the non-governmental process of engaging in an arms-length, interactive process of employer and employee to freely contract and bargain for working conditions outside of the oversight and regulation of the government.<sup>146</sup> These concepts began sans government intervention, and based on laissez-faire concepts of

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<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

<sup>139</sup> *Id.* at 271.

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

<sup>142</sup> *Id.* at 272.

<sup>143</sup> See, e.g., Kochan, *supra* note 8.

<sup>144</sup> Cf. FRANK TANNENBAUM, THE LABOR MOVEMENT: ITS CONSERVATIVE FUNCTIONS AND SOCIAL CONSEQUENCES 125 (1921) (distinguishing between the radical and conservative labor movement and finding the greatest difference is one of consciousness).

<sup>145</sup> Cf. Robert J. Rabin, *The Role of Unions in the Rights-Based Workplace*, 25 U. S.F. L. REV. 169, 171 (1991) (noting that collective bargaining provides workers with a much needed voice in setting the terms and conditions of employment, something not available through government action or public law movements).

<sup>146</sup> See ARCHIBALD COX ET AL., LABOR LAW 502 (Foundation Press 5th ed. 2011).

freedom of contract.<sup>147</sup>

Only because of issues of enforcement of contract and retaliation issues did these processes become codified, legislated, and regulated by the federal government.<sup>148</sup> Management's exploitation of its power as an employer of a single employee led to breach of otherwise valid, bargained-for, meeting of the minds contracts.<sup>149</sup> If management did not exploit its position as an employer by violating the conditions of these collectively bargained contracts, government intervention would not be necessary.<sup>150</sup> Additionally, management consistently flew in the face of the integrity of collective bargaining through retaliation.<sup>151</sup> Management would "get back at" employees for participating in collective bargaining or union activity by firing or punishing these employees.<sup>152</sup> Retaliatory actions were manipulative ways for management to intimidate employees, and to exert control over them by instilling a fear of retaliation that undercuts an employee's ability to freely engage in collective bargaining.<sup>153</sup> As a result, labor laws actually protect the libertarian freedom of the employee to bargain with his employer.<sup>154</sup>

## V. CONCLUSION

The change in the American economy continues to significantly contribute to the growing inequity within the employment sector. This growing inequity demands increased labor union presence in both the manufacturing and non-service sectors as well as in the service sector. Globalization and outsourcing of manufacturing jobs caused about a quarter of the manufacturing jobs in the United States to decrease between 1978 and 1982.<sup>155</sup> The internet revolution and the advent of the rapid changes in technology ushered in a host of skilled jobs.<sup>156</sup> At the same time, the service industry boomed, in the form of retail and sales, social

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<sup>147</sup> See Paul Weiler, *Striking A New Balance: Freedom of Contract and the Prospects for Union Representation*, 98 HARV. L. REV. 351, 419 (1984).

<sup>148</sup> N.L.R.A. § 1, 29 U.S.C. § 151 ("Experience has proved that protection by law of the right of employees to organize and bargain collectively . . . promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, . . . and by restoring equality of bargaining power between employers and employees.").

<sup>149</sup> *Id.*

<sup>150</sup> N.L.R.A. § 7, 29 U.S.C. § 157 (2006).

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

<sup>154</sup> See Weiler, *supra* note 147.

<sup>155</sup> Takahashi, *supra* note 131, at 268.

<sup>156</sup> See *id.* at 271.

services, healthcare services, and education.<sup>157</sup> Skilled labor jobs increased and unskilled labor jobs disappeared at the same time that skilled labor jobs became higher and higher paying, whereas unskilled labor wages remained stagnant.<sup>158</sup> So unions not only have to combat the problem of a lack of jobs available, but also the increasing wage inequities and decrease in opportunities for advancement within the unskilled jobs category.

Today, the Occupy Wall Street movement has earned its respective place in the media by expanding its participants and igniting participation geographically to many major United States cities.<sup>159</sup> It is unclear whether this movement will be a fleeting moment in time, or whether it will have any organizing power for other, more institutionalized movements. The value of enduring organizations, like labor unions, can be juxtaposed with the ephemeral nature of a protest event, by being able to frame multiple events and build networks. The labor movement must endure attacks to its relevance today by attaching itself, like a leech, to the social movements rightly in the spotlight today—movements for marriage equality, the LGBT movement, and immigrants' rights movements.

Traditional methods of organized labor are outdated, and labor's revitalization rests in the increasing intersectionality of labor and other social movements.<sup>160</sup> The dynamic social history of labor in the United States reveals that gains in workers' rights promote worker health, satisfaction, productivity, and innovation. Worker inequality—in the form of discrimination, pay, benefits, and access to work—is a symptom of the widening gap of inequality in the United States and a sign that organized labor has not lost its relevance in the American workplace today. The right to organize, bargain collectively with management, and negotiate the terms of the workplace is rooted not only in federal acts that protect these rights but also in the American concept of freedom to contract and freedom to bargain. Restrictions on these rights, in the form of anti-union laws and the dissolution of organized labor, will ultimately lead to other social problems associated with inequality such as increased health care costs and an increased burden on our social security system. Organized labor must find

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<sup>157</sup> *Id.*

<sup>158</sup> *Id.* at 269.

<sup>159</sup> "Occupy Wall Street" describes itself as a "people-powered movement that began on September 17, 2011 in Liberty Square in Manhattan's Financial District, and has spread to over 100 cities in the United States and actions in over 1,500 cities globally. [Occupy Wall Street] is fighting back against...the role of Wall Street in creating an economic collapse that has caused the greatest recession in generations...and social injustice." See "New York Protest for World Revolution," available at [www.occupywallst.org](http://www.occupywallst.org) (last accessed Dec. 3, 2011).

<sup>160</sup> See Kimberlé Williams Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STANFORD L. REV. 1241-1299 (1999).

its strength in the numbers of people dedicated to other progressive interests and successful advocacy groups already in existence, in addition to reframing its image from an institutionalized and unchangeable system to a dynamic social movement seeking progress and equality.